No. 95-897 (16)

Supreme Court, U.S.
FILED
OCT 11 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION,

[Additional *Amici* Continued on Inside Cover]

AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RONALD S. COOPER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8075
Of Counsel

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

38 pp

BEST AVAILABLE COPY

GOVERNMENT FINANCE OFFICERS ASSOCIATION,
NATIONAL ASSOCIATION OF
STATE PERSONNEL EXECUTIVES,
NATIONAL PUBLIC EMPLOYER
LABOR RELATIONS ASSOCIATION, AND
INTERNATIONAL PERSONNEL
MANAGEMENT ASSOCIATION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-897

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL ASSOCIATION OF STATE PERSONNEL EXECUTIVES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of respondents. Respondents have consented to the filing of the brief. This motion is made necessary by petitioners conditioning their consent on the substantive content of the brief, a condition which *amici* found unacceptable.

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. *Amici* have an especially compelling interest in issues arising from the application of the Fair Labor Standards Act (FLSA) to their workforces. The issue in this case, whether the Department of Labor's salary basis test and disciplinary deduction rule can be applied to determine which state and local government employees are exempt from the FLSA's maximum hours requirement, strikes at the core of this interest.

The Department of Labor promulgated the salary basis test and disciplinary deduction rule during the 1940s and 1950s when the FLSA did not apply to state and local government employers. The rules were thus based exclusively on the practices existing in the private sector. Moreover, in its rulemaking which subjected state and local government employers to the rule, the Department did not study the pay and personnel practices of state and local governments. The Department eventually modified the salary basis test to take into account the public accountability rules which require that state and local government employees at all levels account for their time and which prohibit state and local governments from expending taxpayer funds to pay employees for any time they have not worked. The rules, however, by the Department's own admission, remain "sorely out-of-date," 59 Fed. Reg. 57130 (Nov. 14, 1994), and "are still in need of updating and clarification." 61 Fed. Reg. 23240 (May 13, 1996).

Because the salary basis test and disciplinary deduction rule do not validly identify state and local governments' non-exempt employees, judicial enforcement would nullify Congress' intent to exempt the public sector's "bona fide executive, administrative, or professional" employees from the FLSA's maximum hours standard. 29 U.S.C. § 213 (a)(1). It would provide a windfall to persons such as petitioners who are in every practical sense "executive, administrative, or professional" employees. *See* Pet. App. 14a-35a.

The resolution of this issue will have a substantial impact on the ability of state and local governments to provide essential services to their citizens. *Amici* accordingly move for leave to file the attached brief *amicus curiae* in support of respondents.

Respectfully submitted,

RONALD S. COOPER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8075
Of Counsel

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the*
Amici Curiae

October 11, 1996

QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the Department of Labor's salary basis test and its disciplinary deduction rule can validly be applied to state and local government employers.

2. Whether an employee is "subject to" pay docking in the absence of the employer's actual imposition of a sanction which violates the disciplinary deduction rule.

3. Whether a public sector employer can avail itself of the window of correction rule only when it has made an improper deduction through actual mistake or inadvertence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI*	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. THE SALARY BASIS TEST AND ITS DISCIPLINARY DEDUCTION RULE CANNOT BE APPLIED TO THE PUBLIC SECTOR	8
A. Congress Could Not Have Intended That The Salary Basis Test Apply To The Public Sector Because It Does Not Serve As A Valid Proxy For Identifying The Public Sector's Executive, Administrative and Professional Employees	10
B. As Applied To State And Local Government Employers, The Salary Basis Test Is Arbitrary And Capricious And Is Not Entitled To Deference	17
II. AN EMPLOYEE IS NOT "SUBJECT TO" DOCKING UNLESS THE EMPLOYER ACTUALLY IMPOSES A DISCIPLINARY SANCTION WHICH VIOLATES THE RULE	23
III. THE WINDOW OF CORRECTION IS AVAILABLE IN THIS CASE	24
CONCLUSION	26
APPENDIX	1a

TABLE OF AUTHORITIES

Cases — Page

Amshey v. United States, 26 Cl. Ct. 582 (1992), *vacated*, 35 Cl. Ct. 358 (1993) 14
Avery v. City of Talladega, 24 F.3d 1337 (11th Cir. 1994) 15
Balgowan v. New Jersey Dept. of Transp., 84 F.3d 656, *opinion vacated and rehearing granted*, 1996 WL 381898 (3d Cir. 1996) 15
Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 17
Bowman v. City of Indianapolis, 927 F. Supp. 309 (S.D. Ind. 1996) 15, 22
Carpenter v. City and County of Denver, 82 F.3d 353 (10th Cir. 1996) 15
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 10
Childers v. City of Eugene, 922 F. Supp. 403 (D. Or. 1996) 15
Close v. New York, 1996 WL 67979 (N.D.N.Y.), *vacated on other grounds*, 1996 WL 481550 (N.D.N.Y.) 15, 19
Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985) 3-4, 9, 11
Gregory v. Ashcroft, 501 U.S. 452 (1991) 8
Hackett v. Lane County, 91 F.3d 1289 (9th Cir. 1996) 15
Hurley v. Oregon, 27 F.3d 392 (9th Cir. 1994) .....
Jackson v. Kentucky, 892 F. Supp. 923 (E.D. Ky. 1995) 15
Lacey v. Indiana State Police Dept., 810 F. Supp. 244 (S.D. Ind. 1992) 15-16
Lucero v. Regents of the Univ. of Cal., 1993 WL 341287 (N.D. Cal.) 15
McCloskey v. Triborough Bridge & Tunnel Auth., 903 F. Supp. 558 (S.D.N.Y. 1995) 15
McGrath v. City of Philadelphia, 864 F. Supp. 466 (E.D. Pa. 1994) 15
McGuire v. City of Portland, 91 F.3d 1293 (9th Cir. 1996) 15

TABLE OF AUTHORITIES—Continued

Page

Meringolo v. City of New York, 908 F. Supp. 160 (S.D.N.Y. 1995) 15, 19
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) 17, 19
Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586) 15
New York v. United States, 505 U.S. 144 (1992) .. 9
Pautlitz v. City of Naperville, 781 F. Supp. 1368 (N.D. Ill. 1992) 16
Spradling v. City of Tulsa, 1996 WL 518438 (10th Cir.) 15
United States v. Morton, 467 U.S. 822 (1984) 10
Yourman v. Dinkins, 84 F.3d 655 (2d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 29, 1996) (No. 96-152) 15

Statutes And Regulations

5 C.F.R. Pt. 551 ..... 13, 14, 18
29 C.F.R. § 541.1 ..... 2, 16
29 C.F.R. § 541.2 ..... 2, 16
29 C.F.R. § 541.3 ..... 2, 16
29 C.F.R. § 541.118 ..... 12, 22
29 C.F.R. § 541.118(a) 2, 23
29 C.F.R. § 541.118(a) (5) ..... *passim*
29 C.F.R. § 541.118(a) (6) 7, 24-25, 25
5 U.S.C. § 706 17
5 U.S.C. § 7503 ..... 5, 18, 21
5 U.S.C. § 7503(a) 14
29 U.S.C. § 213(a) ..... *passim*
29 U.S.C. § 216(b) 25

Other Authorities

14 Fed. Reg. 7735 (Dec. 28, 1949) 10
19 Fed. Reg. 1321 (Mar. 9, 1954) 10
19 Fed. Reg. 4405 (July 17, 1954) 10
52 Fed. Reg. 2012 (Jan. 16, 1987) 11, 18
57 Fed. Reg. 37666 (Aug. 19, 1992) ..... *passim*
59 Fed. Reg. 57129 (Nov. 14, 1994) 4, 16

TABLE OF AUTHORITIES—Continued

	Page
61 Fed. Reg. 23239 (May 13, 1996)	4, 11-12, 12, 16
Kantor Report (Mar. 3, 1958)	10
Letter, Director, Office of Management & Budget to Secretary of Labor (Apr. 14, 1994)	9
National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973)	20
G. Jerry Shaw & William L. Bransford, *The Federal Manager's Handbook* (1994)	14, 18
Isidore Silver, *Public Employee Discharge and Discipline* (1995)	14, 19
Ronald D. Sylvia, *Public Personnel Administration* (1994)	14
U.S. Department of Labor, Wage and Hour Letter (Mar. 29, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:8003]	3, 19, 22
U.S. Department of Labor, Wage and Hour Letter (Dec. 24, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:5257]	3
U.S. Department of Labor, Wage and Hour Letter (Mar. 30, 1994) [reprinted at Wage & Hour Cas. (BNA) 99:5290]	3
Robert G. Vaughn, *Principles of Civil Service Law* (1976)	14
Weiss Report (June 30, 1949)	*passim*
O.W. Wilson, *Police Planning* (2d ed. 1973)	20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 95-897

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL ASSOCIATION OF STATE PERSONNEL EXECUTIVES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

In enacting the FLSA, Congress exempted from the Act's maximum hours requirements those persons "employed in a bona fide executive, administrative, or professional capacity," and granted the Department of Labor rulemaking authority to "define[] and delimit[] [these terms] from time to time." 29 U.S.C. § 213(a). The salary basis test and its disciplinary deduction rule are exercises of this authority.[1]

The salary basis test and its disciplinary deduction rule were promulgated on the basis of the Department of Labor's study of private sector pay practices during the 1940s and 1950s, years before the FLSA was extended to state and local governments. Based on these studies, the Department concluded that "bona fide executive, administrative and professional employees are almost universally paid on a salary or fee" basis and that such an employee must "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." *Weiss Report*, June 30, 1949 [J.A. 36, 39]. Thus, as a general rule, the Department's regulations provide that even when an employee performs executive, administrative or professional duties, if the employee's "compensation . . . is . . . subject to reduction because of variations in the quality or quantity of the work performed," the employee is deemed to be hourly and entitled to overtime. 29 C.F.R. § 541.118(a).

The disciplinary deduction rule, *id.* § 541.118(a)(5), is likewise based on the Department's finding that in the

[1] Under the Department's regulations, an employee must meet both a duties test and the salary basis test to be deemed exempt from the FLSA's maximum hours requirement. *See* 29 C.F.R. §§ 541.1; 541.2; 541.3.

private sector during the 1940s, "[t]he disciplining of [executive, administrative and professional] employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary." *Weiss Report*, June 30, 1949 [J.A. 39]. The rule supplements the salary basis test by providing that "[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5). In a reflection of the industrial economy upon which the regulation was based, the rule narrowly defines "safety rules of major significance" to "include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines." *Id.* While the Department has construed the regulation to authorize disciplinary deductions for the violation of Department of Defense industrial security regulations, *see* U.S. Department of Labor, Wage and Hour Letter (Dec. 24, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:5257], "employees may not be suspended without pay for a day or more where the reason is something other than serious safety violations." U.S. Department of Labor, Wage and Hour Letter (Mar. 30, 1994) [reprinted at Wage & Hour Cas. (BNA) 99:5290].[2]

As the Department has previously acknowledged, these rules were promulgated on the basis of hearings "conducted before the public sector became subject to the FLSA [and] did not include an examination of prevailing governmental pay practices." 57 Fed. Reg. 37672 (Aug. 19, 1992). The Department nonetheless applied the rules to state and local government employers after *Garcia v.*

[2] *See also* U.S. Department of Labor, Wage and Hour Letter (March 29, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:8003] ("Disciplinary deductions made from the salary of an RN for violating [hospital and state] rules relating to patient well-being and job performance are not the type of deductions that would be permitted by section 541.118(a)(5) of the regulations.").

San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985), held that the Tenth Amendment did not prohibit Congress from applying the FLSA to the States.

Thus, shortly thereafter DOL was confronted with the reality that state and local government employers are subject to public accountability rules which require that employees at all levels account for their time in hourly increments and prohibit the expenditure of taxpayer funds to employees for any time they have not worked. *Id.* at 37667. The Department recognized that the salary basis test does not reflect public sector pay practices and that to apply it would effectively nullify the intent of Congress by denying state and local governments the exemption for their executive, administrative and professional employees. *Id., see also id.* at 37670, 37673.

While the Department amended the salary basis test to account for public accountability principles, it did not revisit the disciplinary deduction rule. *Id.* at 37674. The Department has thus subsequently recognized that "[t]hese revisions were limited in nature," that "the regulations are sorely out-of-date," and that "the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employment." 59 Fed. Reg. 57129-30 (Nov. 14, 1994). The Department has recently reaffirmed this view. *See* 61 Fed. Reg. 23239 (May 13, 1996).

SUMMARY OF ARGUMENT

1. The salary basis test and its disciplinary deduction rule do not validly identify executive, administrative and professional employees of state and local governments who are exempt from the FLSA's maximum hours requirement. The regulations thus cannot be applied to state and local government employers without violating Congress' intent

to exempt these employees from the FLSA's maximum hours requirement.

The Department of Labor promulgated the salary basis test and its disciplinary deduction rule in the 1940s and 1950s on the basis of studies it conducted of the private sector. In theory, one of the hallmarks of being a "bona fide executive, administrative, or professional" employee, 29 U.S.C. § 213(a)(1), is that such an employee is paid on a salary basis and is disciplined through sanctions which do not include deductions from pay or short term suspensions.

The Department has acknowledged, however, that these rules were created on the basis of hearings "conducted before the public sector became subject to the FLSA [and] did not include an examination of prevailing governmental pay practices." 57 Fed. Reg. 37672 (Aug. 19, 1992). Moreover, in extending the rule to state and local government employers, the Department did not comprehensively study the disciplinary systems of state and local government employers to determine the extent to which they rely on the ability to impose partial pay period suspensions on their executive, administrative and professional employees in order to maintain discipline and efficiency in the workforce.

The federal government—which is far more analogous to state and local government employers than the private sector—does not utilize the salary basis test and the disciplinary deduction rule in applying the FLSA to itself. Indeed, the federal government exercises statutory authority to suspend all levels of employees in the competitive service (including those who are FLSA-exempt) for less than a full pay period "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7503. This authority, which is far broader than that allowed under the disciplinary deduction rule, is itself strong evidence that the use of short term suspensions is a necessary tool for maintaining discipline and efficiency of employees at all levels in the public sector workforce. It demonstrates that

the premise which underlies the rule does not apply in the public sector and that the Labor Department should have engaged in a careful study to determine whether extension of the rule to state and local government employers was justifiable.

The extensive litigation that has already occurred on the applicability of the rule to state and local government employers is further testament to the importance to state and local governments of having authority to impose short term suspensions on their executive, administrative and professional employees. It likewise demonstrates that the premise of the Department's disciplinary deduction rule does not apply in the public sector and that the rule is not a valid proxy for determining whether state and local government employees are exempt. This being the case, judicial enforcement of the rule would violate Congress' intent to exclude state and local governments' executive, administrative and professional employees from the FLSA's maximum hours provision.

2. The Department's extension of the salary basis test and its disciplinary deduction rule to state and local government employers was arbitrary and capricious and thus violates the Administrative Procedure Act. The Department entirely failed to consider whether the premise which supported the rule's initial application to the private sector in the 1940s and 1950s also supports its extension to state and local government employers. It failed to do so even though the federal government does not apply these rules to itself in implementing the FLSA and has statutory authority to impose suspensions of less than a pay period on all employees in the competitive service.

The rule is also irrational. The Labor Department has explained that employers do not violate the rule if they suspend an employee for a full week even when the employee is paid on a bi-weekly basis. But if the point of the rule is to differentiate between salaried and hourly employees, it is illogical to allow suspensions for less than

the employee's full pay period. Moreover, because public employees at all levels do not control their own time but are paid only for work they actually perform, a suspension for less than a week is not probative of whether they are salaried or hourly employees.

3. The court of appeals correctly held that an employee is not "subject to" docking unless an employer actually imposes a disciplinary sanction which violates the rule. Petitioners' contention that they are subject to docking merely because the police manual authorizes suspensions of less than a week ignores that the manual, for each offense, also authorizes sanctions which do not violate the rule. Indeed, because for each offense the police manual provides a penalty range which includes a suspension of five days or more—which does not violate the rule—it is disingenuous for petitioners to contend that they are responding to the prospect of receiving a suspension which violates the rule. It is also unreasonable because it presumes that in the event an exempt employee violates the police department's rules, the department will respond by imposing a sanction which violates the disciplinary deduction rule. Absent the actual imposition of pay docking which violates the rule, there is no basis for concluding that the employer will not comply with the FLSA in disciplining its employees.

4. The window of correction rule is not limited to instances where an improper suspension is the result of the employer's "actual mistake or inadvertence." Pet. Br. 43. The plain language of the rule clearly—and disjunctively—provides that where a deduction "is made for reasons other than lack of work, the exemption will not be considered to have been lost." 29 C.F.R. § 541.118(a)(6). Contrary to petitioners' contention, an employer cannot make repeated deductions with impunity, because if it does the employee will be deemed to be hourly and entitled to overtime as well as liquidated damages and attorney's fees as provided by the FLSA. Petitioners' construction of the regulation would in the case of iso-

lated deductions defeat Congress' purpose by providing windfalls to employees who are in every sense "bona fide executive, administrative, or professional employees," 29 U.S.C. § 213(a), and exempt from the FLSA's maximum hours standard.

ARGUMENT

I. THE SALARY BASIS TEST AND ITS DISCIPLINARY DEDUCTION RULE CANNOT BE APPLIED TO THE PUBLIC SECTOR

When it extended the Fair Labor Standards Act to employees of state and local governments, Congress clearly expressed its intent that the FLSA's maximum hours provision "shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a). The salary basis test and its disciplinary deduction rule are an exercise of the Secretary of Labor's rulemaking authority under Section 213 to "define[] and delimit[]" these terms "from time to time." *Id.*

As an initial matter, *amici* note that this case presents a serious question as to whether Congress can delegate broad authority to an administrative agency which can be exercised in a manner that is as disruptive of the federal-state balance as has been done here. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Department's disciplinary deduction rule, which was devised based on private sector practices, is no more than a tertiary test for determining whether an employee is FLSA-exempt. Yet the Department's reflexive application of that rule to public sector employers seriously intrudes into the structure and sovereign functions of state and local governments by directly affecting how those governments organize and discipline law enforcement and other core personnel.

Judicial endorsement of this practice would enable Congress to evade political accountability for intrusive

policy choices in a manner that is not contemplated by the Constitution. *Cf. New York v. United States*, 505 U.S. 144, 162-63, 169 (1992). It would also circumvent the process of Congressional lawmaking for the protection of the States' interests which the Court relied upon in *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985). Congress cannot be presumed to have intended that highly technical rules developed by the Department for the private sector would be reflexively applied to the States, with such patently disruptive consequences.

Moreover, as explained more fully below, the regulation, which is, of course, simply a tool for implementing the FLSA, is premised on practices which do not obtain in the public sector. The regulation cannot be validly applied to public sector employers because it conflicts with Congress' intent to exempt "bona fide executive, administrative, or professional employees" from the FLSA's maximum hours protection. Furthermore, the Department's extension of the rule to state and local government employers is an arbitrary and capricious exercise of its rulemaking authority. Judicial enforcement of the regulation also threatens to subject state and local government employers to massive overtime liability, with disastrous consequences for their ability to provide essential government services.[8] The Court should accordingly declare the regulation void as applied to States and local governments.

---

[8] *See* Letter from Director, Office of Management & Budget to Secretary of Labor (Apr. 14, 1994) (reprinted in Appendix) ("[D]ue to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars.").

A. Congress Could Not Have Intended That The Salary Basis Test Apply To The Public Sector Because It Does Not Serve As A Valid Proxy For Identifying The Public Sector's Executive, Administrative and Professional Employees

Any agency rule which conflicts with Congress' intent is void. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *United States v. Morton*, 467 U.S. 822, 834 (1984). The salary basis test and its disciplinary deduction rule, as applied to public sector employers, is manifestly contrary to Congress' intent to exclude executive, administrative and professional employees from the FLSA's maximum hours provisions and therefore cannot be judicially enforced.

The purpose of the salary basis test is to identify those persons who are "employed in a bona fide executive, administrative, or professional capacity" and are thus exempt from the FLSA's maximum hours protection under the statute's terms. 29 U.S.C. § 213(a); *Kantor Report*, March 3, 1958 [reprinted at J.A. 42]. In theory, "payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment," as such individuals "are normally allowed some latitude with respect to the time spent at work." *Weiss Report*, June 30, 1949 [reprinted at J.A. 36-38]. As the *Weiss Report* further explained, "bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee" rather than an hourly basis. *Id.* [J.A. 36].

Public sector employers were not, however, subject to the FLSA when the Labor Department promulgated the salary basis test and its component disciplinary deduction rule in 1949 and 1954 respectively. *See* 14 Fed. Reg. 7735 (Dec. 28, 1949); 19 Fed. Reg. 1321 (Mar. 9, 1954) (notice of proposed rulemaking); 19 Fed. Reg. 4405 (July 17, 1954) (final rule); *see also* 57 Fed. Reg. 37672 (Aug. 19, 1992). Accordingly, public sector employers

had no reason to participate in the rulemaking proceedings and the Department had no reason to study their employment practices in devising the rule. *See id.* While the salary basis test and the disciplinary deduction rule may still accurately reflect the nature of private sector pay practices, it is undeniable that these rules were promulgated without the Secretary ever having studied whether they reflect the realities of the public sector workplace, which they most assuredly do not. As the Secretary has acknowledged, these regulations were created on the basis of hearings "conducted before the public sector became subject to the FLSA [and] did not include an examination of prevailing governmental pay practices." *Id.*

In the aftermath of *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985), and the Fair Labor Standards Amendments of 1985, the Department promulgated its rules subjecting state and local government employers to the FLSA, including the salary basis test. At that time, DOL was confronted with the reality that public accountability principles ordinarily require state and local government employees at all levels to account for their time in hourly increments and forbid state and local governments from expending taxpayer funds to pay employees for any time they have not worked. *See* 52 Fed. Reg. 2012, 2019 (Jan. 16, 1987). The Department subsequently recognized that because of public accountability principles it is contrary to Congress' intent to apply the salary basis test to public sector employers. *See* 57 Fed. Reg. 37672 (Aug. 19, 1992).

The disciplinary deduction rule is no more validly applied to determine whether public sector employees are bona fide executive, administrative or professional employees than was the abandoned partial day docking rule. To judicially enforce the disciplinary deduction rule in suits brought against state and local government employers would be especially untoward given the Department's acknowledgment that "[b]ecause of the limited

nature of th[is] revision[], the regulations are still in need of updating and clarification." 61 Fed. Reg. 23240 (May 13, 1996).

The salary basis test, 29 C.F.R. § 541.118, mandates that an FLSA-exempt employee "must receive his full salary for any week in which he performs any work," subject to a few exceptions. One of these exceptions is the disciplinary deduction rule, which provides:

> Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

Id. § 541.118(a)(5). This rule is understood to mean that the salary basis test is violated (and an employee's FLSA exemption is lost) by the employer's imposition of a penalty suspension without pay of less than a week, unless the penalty is imposed for the violation of a major safety rule.

As stated above, the disciplinary deduction rule is based on the Department's study of private sector pay practices in the largely industrial economy of the 1940s and 1950s. *See* 61 Fed. Reg. 23240 (May 13, 1996). In theory, one of the hallmarks of being a "bona fide executive, administrative, or professional employee" is that one's salary is not subject to a disciplinary sanction which includes the deduction of pay. *See Weiss Report,* J.A. 39. As the *Weiss Report* states, "[t]he disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deduction from salary." *Id.* But as the *Weiss Report* makes clear, this premise is based on the Department's study of exclusively private sector pay practices. *See id.,* J.A. 37-39.

Even in the private sector, however, the notion that disciplinary deductions are inconsistent with status as an executive, administrative or professional employee is hardly inviolate. The disciplinary deduction rule itself, for example, allows employers to impose disciplinary deductions on exempt employees for the violation of "safety rules of major significance" without deeming them to have violated the salary basis test. 29 C.F.R. § 541.118(a)(5). Moreover, during World War II, the Department ruled that employers could impose disciplinary deductions "to discourage absenteeism among executive and administrative employees" without running afoul of the salary basis test. *Weiss Report,* J.A. 37.

These instances in which the Department determined that disciplinary deductions are not inconsistent with status as an exempt employee, presumably because employers had a substantial need for retaining this authority, should have strongly suggested to the Department that study of the public sector was necessary before the rule was reflexively extended to it. In extending the rule, however, the Department did not comprehensively study the disciplinary systems of state and local government employers to determine the extent to which they rely on the ability to impose partial pay period suspensions on their executive, administrative or professional employees in order to maintain discipline in the workforce. *See* 57 Fed. Reg. 37674. Instead, the Department appears to have erroneously assumed (the Department having never set forth its justification) that the private sector practice applies equally to the public sector.

The most powerful indication that this rule manifestly does *not* fit public sector personnel practices is that in applying the FLSA to itself, the federal government—which is far more analogous to state and local government employers than the private sector—does not utilize the salary basis test and the disciplinary deduction rule. *See* 5 C.F.R. Pt. 551. Most significantly, the federal gov-

ernment exercises statutory authority to suspend all levels of employees in the competitive service (including those who are FLSA-exempt) "for 14 days or less [which is less than a full pay period] for such cause as will promote the efficiency of the service." 5 U.S.C. § 7503(a). This is, of course, a far broader authority than that allowed under the disciplinary deduction rule. *See, e.g.*, 1 Isidore Silver, *Public Employee Discharge And Discipline* § 3.23, at 185 (1995); Robert G. Vaughn, *Principles Of Civil Service Law* § 5.4 (1976).

That the federal government both subjects FLSA-exempt employees to short term suspensions and does not apply the disciplinary deduction rule to itself is strong evidence that the use of short term suspensions is a necessary tool for maintaining discipline and efficiency of employees at all levels in the public sector workforce. *See* G. Jerry Shaw & William L. Bransford, *The Federal Manager's Handbook* 60-61 (1994) (discussing use of short term suspension as part of a system of progressive discipline); Ronald D. Sylvia, *Public Personnel Administration* 306-07 (1994) (describing central role of short term suspension in the progressive discipline systems universally used in public sector). It is also strong evidence that the premise which underlies the rule does not apply in the public sector.[4] At a minimum, it should have suggested to the Labor Department that extensive study was necessary to determine whether extension of the rule to state and local government employers was justifiable.

[4] Asserting that "[l]aw enforcement Sergeants and Lieutenants in the federal sector are covered by the salary basis test and its 'subject to' discipline rule and are non-exempt," petitioners' *amici*, International Union of Police Associations *et al.*, cite *Amshey v. United States*, 26 Cl. Ct. 582 (1992), *vacated*, 35 Cl. Ct. 358 (1993). *See* Br. *Am. Cur. IUPA* 6 n.5. The vacated *Amshey* opinion provides no authority for IUPA's contention. The Office of Personnel Management and not the Labor Department implements the FLSA in the federal workplace; its regulations do not include a salary basis test and disciplinary deduction rule. *See* 5 C.F.R. Pt. 551.

It is no answer to say that the Department did so when, during the course of its public accountability rulemaking, it discussed and rejected several comments submitted on behalf of public employers which sought modification of the disciplinary deduction rule. *See* 57 Fed. Reg. 37674 (Aug. 19, 1992); Br. *Am. Cur.* AFL-CIO at 9-10. As the Department itself acknowledged, the disciplinary deduction rule "was not open for comment during the [public accountability] rulemaking." 57 Fed. Reg. 37674. That being the case, it is no surprise that only a small portion of the comments submitted by public employers pointed out the rule's infirmity.

The federal government's rejection of the rule is not, however, the only compelling evidence of its unsuitability for application to other public sector employers. The extensive litigation that has already occurred on the applicability of the rule to public sector employment is itself strong testament to the widespread use by state and local governments of such deductions in disciplining their executive, administrative and professional employees.[5]

[5] *See Spradling v. City of Tulsa*, 1996 WL 518438 (10th Cir.); *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996); *Hackett v. Lane County*, 91 F.3d 1289 (9th Cir. 1996); *Balgowan v. New Jersey Dept. of Transp.*, 84 F.3d 656, *opinion vacated and rehearing granted*, 1996 WL 381898 (3d Cir. 1996); *Yourman v. Dinkins*, 84 F.3d 655 (2d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 29, 1996) (No. 96-152); *Carpenter v. City & County of Denver*, 82 F.3d 353 (10th Cir. 1996); *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586); *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994); *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994); *Bowman v. City of Indianapolis*, 927 F. Supp. 309 (S.D. Ind. 1996); *Childers v. City of Eugene*, 922 F.Supp. 403 (D. Or. 1996); *Close v. New York*, 1996 WL 67979 (N.D.N.Y.), *vacated on other grounds*, 1996 WL 481550 (N.D.N.Y.); *Meringolo v. City of New York*, 908 F. Supp. 160 (S.D.N.Y. 1995); *McCloskey v. Triborough Bridge & Tunnel Auth.*, 903 F. Supp. 558 (S.D.N.Y. 1995); *Jackson v. Kentucky*, 892 F. Supp. 923 (E.D. Ky. 1995); *McGrath v. City of Philadelphia*, 864 F. Supp. 466 (E.D. Pa. 1994); *Lucero v. Regents of the Univ. of Cal.*, 1993 WL 341287 (N.D. Cal.); *Lacey v. Indiana State Police Dept.*, 810 F. Supp. 244 (S.D.

This stands in stark contrast to the practice in the private sector, as found by the Department nearly fifty years ago, that "deductions [from salary] are rarely made . . . . The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary." *Weiss Report*, J.A. 39 (footnote omitted). That the premise of the Department's disciplinary deduction rule does not apply in the public sector demonstrates that the rule is not a valid proxy for determining whether such employees are exempt as executive, administrative or professional employees. Because an employer must satisfy both the duties test and the salary basis test (including the disciplinary deduction rule) to prove its entitlement to treat employees as exempt, *see* 29 C.F.R. §§ 541.1; 541.2; 541.3, judicial enforcement of the Department's rule would undermine Congress' intent to exclude such employees of state and local governments from the FLSA's maximum hours provision. It would be especially inappropriate in light of the Department's recent declarations that the regulation is "sorely out-of-date," 59 Fed. Reg. 57130 (Nov. 14, 1994), and is "still in need of updating and clarification." 61 Fed. Reg. 23240 (May 13, 1996).

The salary basis test and disciplinary deduction rule serve their purpose of identifying exempt employees only to the extent they reflect the pay and personnel practices of the private and public sectors. Because the rules—with the exception of the public accountability amendments—do not reflect the practice of state and local governments, they are not valid proxies for determining whether their employees are within the Section 213 exemption. The Department's reflexive application of the rules to state and local government employers has led to highly disruptive consequences that Congress could never have intended. The Court should therefore declare the rules void as applied to them.

Ind. 1992); *Pautlitz v. City of Naperville*, 781 F. Supp. 1368 (N.D. Ill. 1992).

B. As Applied To State And Local Government Employers, The Salary Basis Test Is Arbitrary And Capricious And Is Not Entitled To Deference

As discussed above, Congress could not have intended that the salary basis test and its disciplinary deduction rule apply to the public sector. But even if the rule is reviewed under the more deferential "arbitrary" and "capricious" standard of the Administrative Procedure Act, *see* 5 U.S.C. § 706, it cannot be sustained. The rule thus cannot be judicially enforced in private party suits against state and local governments.

The Court has made clear that the scope of review under the arbitrary and capricious standard is "narrow," and that it does "not . . . substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nonetheless, the Court will set aside an agency rule if it is irrational or not "based on consideration of the relevant factors." *Id.* at 42; *see also Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974). The Court has further explained that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. The disciplinary deduction rule is arbitrary and capricious on several counts.

First, in extending the rule to state and local government employers, the Department has "entirely failed to consider an important aspect of the problem," *id.*, namely, whether the rule's premise is valid in the public sector. As explained above, the Department promulgated the salary basis test and disciplinary deduction rule on the basis of private sector practices during the 1940s and 1950s. It extended the rules to state and local government employers without adequate study to determine whether the premises which support application of the

rule to the private sector apply as well in the public sector. *See* 52 Fed. Reg. 2019 (Jan. 16, 1987). It did so even though the federal government, which is also subject to the FLSA and which is far more analogous to the state and local government workplace than the private sector, does not apply the salary basis test in determining whether their employees are within the exemption. *See* 5 C.F.R. Pt. 551. That the federal government does not apply the rule to itself should have given the Department a strong indication that further study was necessary to determine whether the rules could be validly applied to state and local governments.

Remarkably, the Department promulgated these rules notwithstanding that state and local government employers had forewarned it that the salary basis test conflicted with the public accountability rules which prohibit the payment of wages in the absence of work. *See* 52 Fed. Reg. 2019 (Jan. 16, 1987). While the Department eventually amended the salary basis test to take into account public accountability rules, albeit in a process which took five and a half years to complete, *see* 57 Fed. Reg. 37674 (Aug. 19, 1992), the Department, in extending the disciplinary deduction rule to public sector employers has "entirely failed to consider" the most fundamental issues.

Because the Department did not study the disciplinary practices of public sector employers, it had no basis to conclude that the premise of the rule—that employers rarely impose deductions from salary or partial pay period suspensions as sanctions for misconduct by executive, administrative or professional employees—holds true in the public sector. Yet it had only to look no further than the practice of the federal government to determine that the use of such suspensions is deemed by the Nation's largest public employer to be a vital tool for maintaining workplace efficiency and discipline. *See* 5 U.S.C. § 7503; Shaw, *The Federal Manager's Handbook* at 60. Having never studied the disciplinary systems of public sector employers,

including the restraints on employers' use of disciplinary sanctions imposed by state and local governments' civil service rules as well as by collective bargaining agreements,[6] *see* Silver, *Public Employee Discharge And Discipline* §§ 1.2 & 1.3, at 3-5, the Department has failed to consider the intrusive impact of its rule on state and local governments.[7] And it is simply not credible to argue that Congress has sanctioned the Department's extension of the rule to state and local governments, *see* Pet. Br. 27-28, when it expressly provides federal workforce managers with the very authority which the Department's rule denies state and local governments.

The Department's failure to study the impact of its rule is a fatal omission given the patently compelling need of public sector employers to maintain a high level of dis-

---

[6] One of the more pernicious effects of the Department's rule is that it undermines collectively bargained agreements. Even when public employees have agreed through collective bargaining that the employer should have authority to impose disciplinary suspensions of less than a week, the Department has ruled that such suspensions render an employee non-exempt. *See* U.S. Department of Labor, Wage and Hour Letter (March 29, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:8003]. *See also Close v. New York*, 1996 WL 67979, at *7 (employees were not FLSA-exempt even though "collective bargaining agreement provide[d] for the discipline of employees," including fines and suspensions without pay); *Meringolo v. City of New York*, 908 F. Supp. at 163, 169 (holding that first line supervisory corrections officers were not FLSA-exempt even though collective bargaining agreement covered treatment of disciplinary violations).

[7] *Amici* do not suggest that formal hearings of the sort conducted by the Department in promulgating the original rule are required. *See generally Weiss Report*, J.A. 36-41. The Department, however, like any other agency, has the burden of studying the regulated area and justifying its rule. *See Motor Vehicle Manufacturers*, 463 U.S. at 43. In this respect the Department has totally failed to meet its burden of justifying the imposition of the rule on state and local governments.

cipline among their employees in certain areas of employment, especially those engaged in law enforcement duties.[8] As one authority explains, "[t]he police service, like the military, has traditionally demanded high standards of discipline from its members. Employee behavior is controlled by police agencies to a greater degree than in most professions or services." National Advisory Commission on Criminal Justice Standards and Goals. *Police* 469 (1973). *See also* Pet. App. 102a-149a (City of St. Louis Police Department Manual) (enumerating disciplinary rules and range of disciplinary sanctions for violations); O.W. Wilson, *Police Planning* 339-79 (2d ed. 1973) (Duty Manual Excerpts, Portland, Maine, Police Department); Br. *Am. Cur.* International Union of Police Associations 26 ("a disciplinary code is an important part of the paramilitary structure" of a police department). Law enforcement officers are granted extraordinary authority. The importance to state and local governments of maintaining

[8] Indeed, private sector employers only infrequently impose pay deductions on their executive, administrative and professional employees for the violation of major safety rules (as permitted by the disciplinary deduction rule), because such employees are unlikely to commit such violations. The rule nonetheless allows employers to make these deductions without running afoul of the salary basis test; it does not limit employers to other sanctions. *See* 29 C.F.R. § 541.118(a)(5). Presumably this is because employers have a demonstrable need to maintain employee adherence to their safety rules, and other sanctions are either too light or too harsh.

If important private sector employer interests warrant an exception to the rule even when such discipline is likely to be infrequent, it is hard to understand why the Department has failed to examine whether public sector employers have similarly pressing needs. This is particularly true with respect to such public sector employers as police and fire departments as well as medical facilities, where employees are entrusted with the lives and safety of the citizenry and have traditionally been subject to a wide range of disciplinary sanctions. *See, e.g.*, Pet. App. 102a-149a (St. Louis Police Manual).

high standards of discipline is self-evident.[9] The Labor Department's extension of the rule while failing to even consider its impact on state and local governments is an abuse of its rulemaking authority.

Beyond the Department's failure to justify the extension of the rule to state and local governments, the rule is, as a substantive matter, irrational and therefore void. The purpose of the rule is to differentiate between exempt "executive, administrative, and professional employees [who]

[9] The Sergeants and Lieutenants contend that the docking rule "is operationally reasonable." Pet. Br. 35. They further contend that:

> Public employers need not claim that they *must* suspend sergeants and lieutenants for periods of less than a week for rule infractions. Other forms of discipline are superior. Suspensions in pay remove such needed officers from the streets of our communities and other important law enforcement duties. Moreover, for an overworked sergeant or lieutenant, a day or two "vacation" may not be viewed as disciplinary at all.

Id.

This argument trivializes the significance of short term suspensions for maintaining discipline. It likewise demeans the professionalism of the Sergeants and Lieutenants. The only sense in which a day or two suspension can be characterized as a "vacation" is if, by dint of the Labor Department's rule, state and local governments are required to pay a disciplinee's salary during such a suspension or lose the exemption. It is also a perverse argument because if employers are denied the flexibility to impose short suspensions, they will likely choose to impose suspensions of at least a week's length to remain in compliance with the rule.

State and local police administrators are already subject to ample restraints on their ability to choose appropriate disciplinary sanctions in the form of state and local regulations and collective bargaining agreements. They are quite capable of determining—without the guidance of the federal government—whether in a particular case an officer should be suspended from duty or receive some other sanction. To subject state and local police administrators to additional restraints in the form of the disciplinary deduction rule is especially impudent in light of the federal government's broad authority to impose short term suspensions on its own FLSA-exempt employees. *See* 5 U.S.C. § 7503.

are almost universally paid on a salary or fee basis" and hourly employees. *See Weiss Report*, J.A. 36. As the Department explained nearly fifty years ago, "payment of anything less than the full salary seems to cast doubt upon the bona fide character of the employee's executive, administrative, or professional status." *Id.*, J.A. 39.

The Department has ruled, however, that an employer does not violate the rule when it suspends an employee for a full week even when the employee is paid on a bi-weekly basis. U.S. Department of Labor, Wage and Hour Letter (March 29, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:8003]. If the point of the rule is to differentiate between salaried and hourly employees, it is irrational to allow suspensions for less than the employee's full pay period. To be sure, that the Department permits employers to impose suspensions of a week even when employees are paid on a bi-weekly basis is a dispensation to employers. It nonetheless demonstrates that the rule has no foundation in logic.[10]

Moreover, the salary basis test is based on the premise that exempt executive, administrative and professional employees control their own time. But as the Department has recognized, public accountability principles require state and local government employers to pay their employees only for the work they perform. This being the case, a suspension of less than a week is not probative of whether an employee is an hourly employee because all employees

[10] The rule's irrationality is demonstrated by the fact that even when it is undisputed that an employee meets the Labor Department's duties test, the imposition of a disciplinary deduction of less than a week will result in the employee being deemed non-exempt. *See, e.g.*, 29 C.F.R. § 541.118. Thus, if the Police Board imposed a short term suspension on the Chief of Police for a minor rules violation, the Chief would be deemed non-exempt. As one court has observed, "we do not think it is rational to consider such suspensions as conclusive evidence that an employee is hourly." *Bowman v. City of Indianapolis*, 927 F. Supp. at 315.

who are subject to public accountability rules are subject to pay docking for the days they do not work, no matter how substantial their duties are.

As the foregoing demonstrates, the Labor Department's extension of the salary basis test and its disciplinary deduction rule to state and local governments was arbitrary and capricious. The Court should therefore declare it void.

II. AN EMPLOYEE IS NOT "SUBJECT TO" DOCKING UNLESS THE EMPLOYER ACTUALLY IMPOSES A DISCIPLINARY SANCTION WHICH VIOLATES THE RULE

It is manifest that the Department's rules, as applied to state and local government employers, are contrary to Congress' intent and are arbitrary and capricious. Nonetheless, the sergeants and lieutenants also take issue with the court of appeals' holding that the mere fact that the City's police manual provides for disciplinary suspensions of less than a week does not result in their pay being "subject to reduction because of variations in the quality . . . of the work performed." 29 C.F.R. § 541.118(a); *see also* Pet. Br. 38-43. They assert that they are "subject to" docking and are thus not salaried because they

> know that as a practical matter they are subject to disciplinary suspensions for a portion of their work period's compensation. Employees covered by a widely publicized disciplinary code know that they are covered and respond accordingly, whether or not they or their work mates have actually been docked. The very purpose of disciplinary docking rules is to discourage the conduct prohibited.

Pet. Br. 40 (footnote omitted).

This argument is meritless. It ignores that the St. Louis police manual not only authorizes suspensions that, if imposed, would violate the disciplinary deduction rule, it also

provides for sanctions for each offense which do not. *See* Pet. App. 143a-49a. As a practical matter then, the Sergeants and Lieutenants know that for each offense they are also "subject to" disciplinary sanctions that do not violate the rule, such as reprimands, suspensions of at least five days, and, in some cases, dismissals. *See id.* Given that for every offense the police manual provides a penalty range which includes a suspension of at least five days, it is disingenuous to suggest, as petitioners do, that they are "responding" to the prospect of receiving a shorter suspension which would violate the rule.

Moreover, the Sergeants and Lieutenants erroneously assume that in the event one of them violates the disciplinary code, the police department will respond by imposing a sanction which violates the rule. The police department is entitled to a presumption that it will impose discipline in a manner that is consistent with preserving the FLSA exemption. The recognition of this presumption is warranted because public employers are likely to have written their disciplinary codes unaware of the Labor Department's rule. For example, the police manual at issue here applies "to all commissioned members of the [d]epartment," Pet. App. 107a, which includes both employees who are covered by the overtime provisions and those who are exempt. Absent the actual imposition of pay docking of less than a week's duration, there is no credible basis for concluding that the employer will not comply with the FLSA in disciplining its employees. To hold overwise would exalt a technicality over reality, provide windfalls to employees who are clearly within the exemption, and presume without warrant that public employers have violated the FLSA.

III. THE WINDOW OF CORRECTION IS AVAILABLE IN THIS CASE

The Sergeants and Lieutenants further err in asserting that the "window of correction" rule, 29 C.F.R. § 541.118

(a)(6), does not allow St. Louis to retain the exemption by reimbursing Sergeant Guzy for his two day suspension. *See* Pet. Br. 43-45. They argue that the window is unavailable because the deductions made here were not the result of "actual mistake or inadvertence," *id.* at 43, and that "[t]he Eighth Circuit's ruling would permit an employer to intentionally act in a manner inconsistent with the salary basis test with impunity." *Id.* at 44.

This argument ignores the plain language of the regulation and overstates the consequence of the Eighth Circuit's holding. Contrary to petitioners' suggestion, the regulation does not state that the window is available only when a deduction has been made by "actual mistake or inadvertence." Pet. Br. 43. Rather, the regulation clearly—and disjunctively—provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost." 29 C.F.R. § 541.118(a)(6). As the court of appeals correctly recognized, "because the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not inadvertent, as long as it was made for reasons other than lack of work." Pet. App. 9a-10a n.7.

Nor does the court of appeals' holding allow employers "to intentionally act in a manner inconsistent with the salary basis test with impunity." Pet. Br. 44. Here, the court of appeals determined that Sergeant Guzy's suspension "was a one-time incident." Pet. App. 10a. Contrary to the view of the Sergeants and Lieutenants, an employer cannot make repeated disciplinary deductions with "impunity," because if it does the employee will be deemed to be non-salaried and entitled to overtime, as well as "an additional equal amount as liquidated damages" and attorney's fees. 29 U.S.C. § 216(b).

The court of appeals' holding simply recognizes that where there is an isolated instance of an improper deduction, the proper remedy is to reimburse the employee

for the pay that has been docked and not to give the employee the windfall of years of back overtime pay. This is entirely consistent with the purpose of the FLSA's maximum hours standard, which as petitioners' *amicus* the AFL-CIO emphasizes, "is not intended to increase workers' compensation, but rather to create a financial incentive for employers to spread available work and reduce the dangers of overwork." Br. *Am. Cur.* AFL-CIO at 5. Petitioners' construction of the window of correction regulation is thus not only at odds with the rule's plain language, it would in the case of isolated deductions defeat Congress' purpose by providing windfalls to employees who are in every sense "bona fide executive, administrative, or professional employees," 29 U.S.C. § 213(a), and exempt from the FLSA's maximum hours standard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RONALD S. COOPER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8075
Of Counsel

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

October 11, 1996

APPENDIX

[OMB Logo]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C.

THE DIRECTOR

[Apr. 14, 1994]

Honorable Robert Reich
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

It has recently come to my attention that the section 541 regulations of the Fair Labor Standards Act (FLSA), which govern the payment of overtime, are currently the subject of numerous court cases involving employers and employees in the public sector. There is some prospect that similar court cases will continue to arise until the present regulations are reworked to take into account today's highly-educated, service-oriented workforce. The court cases suggest that, due to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars. I understand that your staff is fully aware of this issue.

I would appreciate it if the Department of Labor would undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy. I also would urge you to work with the Office of Personnel Management (OPM) to ensure consistency, to the degree possible, between your Department's regulations and OPM's regulations as they apply to public sector employees.

My staff would be pleased to work with your staff in framing the scope of this review. I think such an understanding would be an excellent good government exercise. It would dovetail with your effort to improve and streamline the Department's enforcement of Federal labor laws and the Department's quest to ready the American worker and workplace for the 21st Century.

Thank you.

Sincerely,

Original Signed by
Leon E. Panetta
LEON E. PANETTA
Director